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In 1967, Judge Marvin Frankel of the United States District Court for the Southern District of New York said of the then newly revised federal class action rule, Fed. R. Civ. P. 23, that it "tends to ask more questions than it answers."[1] Professor Benjamin Kaplan,[2] reporter for the new civil rules, predicted that a generation or so would pass before the scope, the virtues, and the vices of the new Rule 23 would be fully appreciated.[3] But the 1973-74 Supreme

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The views expressed in this article are solely those of the authors.

1. Frankel, *Some Preliminary Observations Concerning Civil Rule 23,* 43 F.R.D. 39 (1967) [hereinafter cited as Frankel].

2. Then Professor of Law, Harvard University, now Associate Justice of the Supreme Judicial Court of Massachusetts.

3. Frankel, *supra* note 1, at 52.

Court term, with its significant class action decisions[4] has accelerated that process. Now, only eight years later, we know that revised Rule 23 constitutes a rather uncertain weapon for consumers with small claims. The Supreme Court has blunted its edge. Whether Rule 23 can be honed into a more useful tool remains an issue for Congress and for future class action litigants.

THE PROMISE OF 1966

The original Rule 23 was promulgated in 1938, when the Federal Rules of Civil Procedure, uniting law and equity, were first drafted. That rule was in essence a codification of Equity Rule 38,[5] the origins of which are traceable through the Field Code of 1848 back to 17th century English chancery practice.[6] The pre-1966 version of Rule 23 authorized so-called "true" class actions only if the rights sought to be enforced were joint, common, or derivative in character.[7] If a right were "several", and common questions of law or fact predominated, a "spurious" class action could be maintained. Only those members of the "spurious" class who actually entered appearances as parties were bound by the judgment; the spurious class action thus functioned as "little more than a permissive joinder device."[8] As a result of this distinction, the characterization of the right as "joint" or "common" or as merely "several" was critical and, as might have been anticipated, created "almost total

4. Two of those decisions, Zahn v. International Paper Company, 414 U.S. 291 (1973) and Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140 (1974) [hereinafter cited as *Eisen IV*] are highlighted in this article. We do not discuss in any detail a third class action case, American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), in which the Supreme Court held that the commencement of a class action suspends the applicable statute of limitations as to all members of the asserted class. Because of the "subclass action" concept propounded by Justice Douglas in his separate opinion in *Eisen IV*, the *American Pipe & Construction Co.* decision may prove to be very significant. *See* notes 183-85, *infra*, and accompanying text.

5. "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." 226 U.S. 659 (1912).

6. NATIONAL INSTITUTE FOR CONSUMER JUSTICE, STAFF REPORT ON THE CONSUMER CLASS ACTION, at 6-8 (1972) [hereinafter cited as NICJ STAFF REPORT].

7. A "hybrid" class action was authorized if the right were joint and its object specific property. NICJ STAFF REPORT, *supra* note 6, at 8.

8. Snyder v. Harris, 394 U.S. 332, 351 n.14 (1969) (Fortas, J., dissenting). *See* 3B J. MOORE, FEDERAL PRACTICE ¶¶ 23.08-23.14 (2d ed. 1974); NICJ STAFF REPORT, *supra* note 6, at 8-11. Some courts allowed "one-way intervention," by which a class member could join after the establishment of liability to share the favorable judgment, even though he would not have been bound if the suit had failed. NICJ STAFF REPORT, *supra* note 6, at 11.

confusion"[9] in the application of the rule.

The 1966 amendments sought to eliminate the "pitfall of abstract classification"[10] of rights, substituting in its place a functional description of class action types. In particular, the changes sought to make the old "spurious" class action a more effective tool. Under the new rule, members of the Rule 23(b)(3) class are bound by the judgment unless they affirmatively "opt out" of the litigation, a change which differentiates the procedures from permissive joinder and simultaneously places great emphasis on notice to class members.[11]

Nevertheless, the often-expressed purposes of the revisions to Rule 23—increased efficiency and rationality—[12] have failed to materialize. In the ensuing years, the battleground has simply shifted: issues such as aggregation of claims, notice to class members, and the distribution of damages now predominate. The maintenance of class actions depend principally upon the risks of inconsistency among adjudications and the practical dispositive effects of one adjudication upon non-parties. Class actions under section (b)(1),[13] the maintenance of which principally depend upon the risk

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9. NICJ STAFF REPORT, *supra* note 6, at 11.

10. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 386 (1967).

11. *Id.* at 391-92.

12. Reporter Kaplan noted that the dual purposes of the revisions were "(1) to reduce units of litigation by bringing under one umbrella what might otherwise be many separate but duplicating actions; (2) even at the expense of increasing litigation, to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497 (1969).

13. FED. R. CIV. P. 23(b) provides:

> (b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

of inconsistency among adjudications upon non-parties, (b)(2), which involve identical defendant behavior justifying equitable relief, have generated relatively few difficulties. Nor has the typical section (b)(3) class action, in which persons who have suffered a similar legal wrong seek monetary relief, been unduly troublesome for the courts. Rather, it is a particular subset of (b)(3) class actions—those brought on behalf of large numbers of persons, each or most of whom have allegedly sustained nominal or insubstantial individual damages but who in the aggregate have allegedly incurred significant loss—which has caused anguish for courts, litigants, and commentators alike.

The Consumer Class Action: A Need Unfulfilled

The "consumer class action" is the principal member of this subset (another is the environmental class action for damages[14]). The recent *Eisen* litigation[15] is, of course, the most notorious example. This type of litigation seeks recovery from a defendant who has allegedly injured a large number of persons through similar conduct, such as fraudulent sales techniques, sale of shoddy products, misleading advertising, "bait-and-switch" schemes, and the like. Clearly, a consumer who has suffered a small monetary loss is unlikely to pursue legal remedies to recoup that loss; barriers to entry into the judicial marketplace—court costs, legal fees, and delay among them——are simply too high. As C. Wright Mills once observed, "It is better to take one dime from each of 10 million people at the point of a corporation than $100,000 from each of 10 banks at the point of a gun." "It is also," he added, "safer."[16]

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(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

14. *See* note 4, *supra*, and text accompanying notes 48-50, *infra* regarding Zahn v. International Paper Co., 414 U.S. 291 (1973).

15. *See* text accompanying notes 84-187, *infra*.

16. White Collar Criminal at — (G. Geis ed. 1968). *See also* Senate Comm. on Commerce, Class Action Study, 93d Cong., 2d Sess. 2 (1974) [hereinafter cited as Class Action Study], which states: "Supporters also

By permitting large numbers of consumers to assert their similar claims jointly in a single litigation, the class action device can provide an opportunity for redress and, perhaps more importantly, a deterrent to illegal behavior in the future.[17] In this sense, consumer class actions are potentially "efficient" vehicles of social justice. They can be a means to shift and prevent losses in a socially just and economically optimal fashion, at little cost to third parties.[18]

AMOUNT IN CONTROVERSY—THE FIRST BARRIER

Because consumer per capita losses are typically small, even though the injury caused by a defendant in the aggregate may be immense, the $10,000 "amount in controversy" requirement[19] for most federal court actions confronts consumer plaintiffs with a threshhold obstacle. By 1969, the U.S. Supreme Court was forced to deal with the issue of "whether separate and distinct claims presented by and for various claimants in a class action may be added together to provide the $10,000 jurisdictional amount in controversy."[20] This was an issue upon which the Fifth,[21] Eighth,[22] and Tenth[23] Circuits had differed. The Court in *Snyder* v. *Harris*[24] decided that, notwithstanding the 1966 amendments to Rule 23, ag-

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pointed out that . . . unless those persons cheated out of relatively small sums of money could effectively band together under Rule 23, large corporations have, in effect, a license to steal relatively small amounts from large numbers of consumers."; B. Moore, *The Potential Function of the Modern Class Suit*, 2 CLASS ACTION REP. 47, 49-50 (1973) [hereinafter cited as MOORE]; SENATE COMM. OF COMMERCE, REPORT ON THE CONSUMER PROTECTION ACT, 91st Cong., 2d Sess. at 5-6 (1970).

17. *See* NICJ STAFF REPORT, *supra* note 6, at 15-34; Moore, *supra* note 16, at 48, 53; CLASS ACTION STUDY, *supra* note 16, at 30-31.

18. This form of loss-shifting-and-prevention appears to compare quite favorably with the regulatory form, whose costs are borne predominantly by uninvolved third parties and whose effectiveness has been widely questioned. *See, e.g.*, THE CRISIS OF THE REGULATORY COMMISSIONS (P. MacAvoy ed. 1970); Roger Noll, REFORMING REGULATION (1971).

19. *See* 28 U.S.C. §§ 1331-32 (1966).

20. Snyder v. Harris, 394 U.S. 332, 333 (1969).

21. Alverez v. Pan American Life Insurance Co., 375 F.2d 992 (5th Cir.), *cert. denied*, 389 U.S. 827 (1967).

22. Snyder v. Harris, 390 F.2d 204 (8th Cir. 1968), *aff'd*, 394 U.S. 332 (1969).

23. Gas Service Co. v. Coburn, 389 F.2d 831 (10th Cir. 1968), *rev'd*, 394 U.S. 332 (1969).

24. 394 U.S. 332 (1969).

gregation of claims in class actions would not be allowed to satisfy the "amount in controversy" requirement.

The named plaintiffs in *Snyder* and its companion case, *Gas Service Company v. Coburn*,[25] each alleged less than $10,000 in damages. Mrs. Margaret E. Snyder alleged $8,740 in damages, Otto R. Coburn only $7.81.[26] Both named plaintiffs, however, alleged aggregate injuries to the members of the class of more than $10,000.[27] By a 7-2 majority, the Court rejected the aggregation, concluding,

> [T]he adoption of amended Rule 23 did not and could not have brought about this change in the scope of the congressionally enacted grant of jurisdiction to the district courts.[28]

Even though the amended rule had abolished the distinction between "true" and "spurious" class actions, the Court stated that the statutory "matter in controversy" requirement could not be superseded by the rule change; separate and distinct claims (though factually and/or legally related)—the hallmark of the old "spurious" class action—could not be aggregated. By 1916, the Court continued, it was " 'settled doctrine' that separate and distinct claims could not be aggregated to meet the required jurisdictional amount."[29] In support of this proposition, the Court cited *Clark v. Paul Gray, Inc.*,[30] a 1939 case in which the prohibition against aggregation, earlier applied in joinder cases, was held applicable to an action brought by numerous plaintiffs challenging the validity of a California statute imposing $15 in fees for each automobile driven into that state. The Court deemed irrelevant to the aggregation question the 1966 amendments to Rule 23, even though, as the plaintiffs argued, the class judgment, the "matter in controversy," would encompass the claims of all members of the class except those who chose to "opt out," rather than merely those who chose to "opt in." The binding effect of the judgment would be no different than in joinder cases, the Court stated, in which the rule against aggregation was first expressed.[31]

Furthermore, the Court indicated that any rule change which attempted to modify the definition of "matter in controversy"

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25. Gas Service Co. v. Coburn, 394 U.S. 332 (1969).
26. *Id.* at 333-34. The *Snyder* case was a Rule 23(b)(3) action. The *Coburn* case, in which the individual damage was very small, was a typical consumer class action, the injury allegedly having been caused by improper billing and collection of a city franchise tax by the gas company from nonresidents of the city.
27. Snyder v. Harris, 394 U.S. 332, 333-34 (1969).
28. *Id.* at 336.
29. *Id., citing* Pinel v. Pinel, 240 U.S. 594 (1916).
30. 306 U.S. 583 (1939).
31. Snyder v. Harris, 394 U.S. 332, 337 (1969).

> would clearly conflict with the command of Rule 82 that '[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts. . . .'[32]

In the face of consistent interpretation by the courts of the jurisdictional statute forbidding aggregation of claims to satisfy the "matter in controversy" requirement, Congress had repeatedly raised the jurisdictional amount and reenacted the section without attempting to modify the rule against aggregation. Noting this legislative history, the *Snyder* Court even suggested that the latest change in the requisite jurisdictional amount, the increase to $10,000, was purposefully calculated in reliance on the non-aggregation doctrine:

> It is quite possible, if not probable, that Congress chose to increase to $10,000 rather than the proposed increases to $7500 or $15,000 on the basis of workload estimates which clearly relied on the settled doctrine that separate and distinct claims could not be aggregated. . . .
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> To overrule the aggregation doctrine at this late date would run counter to the congressional purpose in steadily increasing through the years the jurisdictional amount requirement. That purpose was to check, to some degree, the rising caseload of the federal courts, especially with regard to the federal Courts' diversity of citizenship jurisdiction.[33]

Rather abruptly, the Court's analysis shifts from precedent and hoary principle to public policy—"[t]he expansion of the federal caseload" and the "transfer into the federal courts [of] numerous local controversies."[34] The fear of adding "to the burdens of an already overloaded federal court system"[35] was a refrain destined for repetition throughout the continuing class action controversy. In light of the purposeful framing of the modified Rule 23 to promote efficiency,[36] it is ironic that the Court viewed these cases as a potential burden to the courts rather than a potential boon to the quotient of dispensable justice.

Dissenting, Justice Fortas, joined by Justice Douglas, recognized even in 1969 the crippling effect of the majority's ruling in *Snyder* on "a generally welcomed and long-needed reform in federal procedure."[37] In addition to its impact on diversity cases like those be-

32. *Id., also citing* Sibbach v. Wilson & Co., 312 U.S. 1, 10 (1941).
33. *Id.* at 339-40.
34. *Id.* at 340.
35. *Id.* at 341.
36. *See, e.g.*, Kaplan, *supra* note 12.
37. Snyder v. Harris, 394 U.S. 332, 342 (1969) (dissenting opinion).

fore the court, the dissenters noted that *Snyder* would rule out all similar cases in which jurisdiction is based on 28 U.S.C. § 1331, the general federal question jurisdiction. Many consumer class actions fall into one of these two categories.[38]

Fortas sharply criticized the majority's "perpetuation of distinctions"[39] between types of class actions, the "true," "hybrid" and "spurious" categories of the pre-1966 Rule.[40] Aggregation rules are based on judicial decision, Fortas insisted, and are thus not "immune from re-evaluation after a fundamental change in the structure of federal class actions has made [their] continuing application wholly anomalous."[41] Congressional silence should not be interpreted as approval of judicial interpretation, and even less should the raising of the jurisdictional amount from $3000 to $10,000 be seen to reflect a sophisticated accounting for cases precluded by aggregation precedents. In any case, it is the new Rule that governs, and old doctrines which must fall.[42]

Most convincing was Fortas's conclusion that under the new Rule 23,

> it is the claim of the whole class and not the individual economic stakes of the separate members of the class which is the 'matter in controversy'.[43, 44]

This is so, he reasoned, because the amended Rule 23 focuses not on the "abstract character of the right asserted," but rather upon "the suitability of the particular claim to resolution in a class action."[45] Once the court weighs the factors specified in the Rule and determines that a class action is appropriate, the judgment in-

38. The most notable specific exception is for antitrust cases. *See* 28 U.S.C. § 1337.

39. Snyder v. Harris, 394 U.S. 332, 346 (1969) (dissenting opinion).

40. After *Snyder*, the need to litigate about such "distinctions" was evident. For a case in which the court ruled against a motion to dismiss for failure to meet the $10,000 jurisdictional amount on the ground that the claims were "joint, common and undivided, and . . . may be aggregated," *see* Cass Clay, Inc. v. Northwestern Public Service Co. at 10 Civil No. 73-4062 (D.S.D., decided April 26, 1974).

41. Snyder v. Harris, 394 U.S. 332, 348 (1969) (dissenting opinion).

42. *Id.* at 350.

43. *Id.* at 353.

44. A minority of courts have sustained jurisdiction when the defendant's potential losses exceeded $10,000 although the plaintiff's did not. *See* MOORE FEDERAL PRACTICE, ¶ 0.91[1] (2d ed. 1974); C. WRIGHT, FEDERAL COURTS, § .34 (2d ed. 1970); and cases cited therein. It has been suggested that such a "modified 'defendant viewpoint' is appropriate to apply in all class action cases, and would produce results more consistent with the policies underlying Rule 23 than does the conventional 'plaintiff-viewpoint'." Note, *Taxpayer Suits and the Aggregation of Claims: The Vitiation of Flast by Snyder*, 79 YALE L.J. 1577, 1592 (1970).

45. Snyder v. Harris, 394 U.S. 332, 352 (1969) (dissenting opinion).

cludes all members of the class and the controversy is defined by their combined interests. Using the *Coburn* case facts as an example, Fortas accurately pinpoints the crux of the matter. Mr. Coburn's case, if it proceeded as a class action, would determine not only whether the Gas Service Company improperly collected his $7.81, but more basically whether the Company was improperly withholding taxes from all 18,000 potential class members. All class members would be affected by the judgment, so the status of their claims under the old Rule 23 as "several" rather than "joint" is irrelevant.[46] Thus viewed, permitting aggregation under the new Rule 23 would not expand the court's jurisdiction, but would merely recognize the entirely new "procedural framework" erected by that rule.[47]

The dissenters' view in *Snyder* is the more appealing opinion in terms of its logic and conclusion. The majority's precise legalistic interpretation of Rule 82 and its reliance upon congressional inaction for support only weakly buttress its conclusion that the 1966 amendments to Rule 23 allow no changes in the aggregation rules. But the prohibition against aggregation had a long history, and fears of shifting too much litigation from the states to the federal arena are understandable in light of the delicate balance of our federalism. Although a different decision may have been hoped for, it could not have been expected. Perhaps the lack of much contrary expectation and the minimal public or media awareness of class actions in 1969 allowed *Snyder* to pass without widespread scrutiny.

In practical effect, though, the *Snyder* decision limited class actions to those areas, such as violations of antitrust and securities laws, in which no amount in controversy was prerequisite to federal jurisdiction. Excluded from federal court were the typical consumer class actions previously described. State court remedies remain, but are hopelessly inadequate. First, not all states have class action rules similar to Rule 23(b)(3), which allow individuals to bring in one action their similar claims based upon the predominance of a common question of law or fact. The other states' procedures effectively bar this type of class action. Second, many consumer class actions involve interstate conduct and potential plain-

46. *Id.* at 353.
47. *Id.* at 356.

tiffs in many states, so that effective action would require a multiplicity of suits. The *Snyder* decision has indeed taken a large toll.

A Loophole Corked

A far less crushing blow last term evoked much greater outcry. In *Zahn v. International Paper Co.*,[48] a loophole left by the *Snyder* decision was carefully corked. No member of the class in *Snyder* or its companion case, *Coburn*, could claim $10,000 or more in damages.[49] But the Zahns and the Leazers, as representatives of a class whose lake-front property had allegedly been damaged by discharges from defendant's pulp and paper-making plant, could each satisfy the jurisdictional amount requirement of 28 U.S.C. § 1332(a) (diversity of citizenship) without the need to resort to aggregation. The sole question confronting the Supreme Court was whether the other members of the class—the 200 unnamed lake-front property owners and lessees, some of whose damages would "to a legal certainty"[50] be less than $10,000—could ride piggyback into federal court via Rule 23. A divided Court said no.

The *Zahn* decision relied on aggregation rules pertaining to pre-1966 "spurious" class actions, invoking the *Snyder* opinion to "[reject] the notion that the 1966 Amendments to Rule 23 were intended to effect, or effected, any change in the meaning and application of the jurisdictional amount requirement insofar as class actions are construed."[51]

In the majority's firm view *Snyder* controlled, albeit *none* of the plaintiffs in *Snyder* had a claim exceeding $10,000. That result followed "inescapably" from the *Snyder* Court's "heavy reliance" on *Clark v. Paul Gray, Inc.*,[52] where all plaintiffs but one (who had a large enough claim) were dismissed. Once again invoking Congress's failure either to act or to express a contrary view to that taken by the judiciary, the Court concluded that the matter was closed.

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48. 414 U.S. 291 (1973).
49. Snyder v. Harris, 394 U.S. 332, 333-34 (1969).
50. Zahn v. International Paper Co., 414 U.S. 291, 292 (1973).
51. *Id.* at 299.
52. 306 U.S. 583 (1939). Indeed, *Clark v. Paul Gray* could be distinguised on several grounds. Never acknowledged or explained by the majority opinions in *Snyder* or *Zahn* is the questionable status of the case as a class action in the first place; it is much more likely a case solely of permissive joinder. Furthermore, it was decided well before the 1966 amendments to Rule 23, and prior to the expansion of ancillary jurisdiction doctrine. Additionally, the *Snyder* Court relied on dictum in the case, not on its holding. *See* Zahn v. International Paper Co., 53 F.R.D. 430, 431 (D. Vt. 1971).

Mr. Justice Brennan, a member of the *Snyder* majority, dissented, calling this further limitation on class actions "both unwarranted and unwise."[53] With Justices Douglas and Marshall joining, Brennan argued that the well-established doctrine of ancillary jurisdiction, by which claims not meeting jurisdictional requirements are allowed to proceed in federal court because of their attachment to jurisdictionally proper claims, could and should be extended to apply to class actions in which the named plaintiffs all meet the jurisdictional amount-in-controversy requirement.[54] Ancillary jurisdiction has been extended to a variety of situations, Brennan observed, in order to bring additional plaintiffs, defendants, or issues within the reach of federal courts.[55] Those rules developed as[56] "accommodations that take into account the impact of the adjudication on parties and third persons, the susceptibility of the disputes in the case to resolution in a single adjudication, and the structure of the litigation as governed by the Federal Rules of Civil Procedure . . . [c]lass actions under Rule 23 (b) (3) are equally appropriate for such treatment."[57]

Brennan carefully catalogued the reasons supporting his conclusions. Because common questions of law and fact must necessarily predominate in order to maintain the class action in the first instance, ancillary jurisdiction could not be used as a subterfuge to obtain federal jurisdiction over unrelated claims of nondiverse parties. Class actions were "born of necessity" to prevent massive joinder or repetitive litigation, both of which place "intolerable" strains on judicial resources, and their advantages should be nurtured.[58]

Justice Brennan squarely faced the most persistent war cry of the recent class action battles, the claimed increase in the federal court dockets presumed to result from class actions. Admitting "some increase" in the docket possible if, absent the class action,

53. Zahn v. International Paper Co., 414 U.S. 291, 312 (1973) (dissenting opinion).
54. Much of Justice Brennan's logic would apply equally to a class action where one but not all of the named plaintiffs met the amount in controversy requirement, although he does distinguish between the "impact on a case of an appearing party and a nonappearing class member." *Id.* at 310.
55. *Id.* at 309.
56. *Id.* at 305-06.
57. *See* Frankel, *supra* note 1, at 51.
58. Zahn v. International Paper Co., 414 U.S. 291, 307 (1973).

many claimants would simply never obtain federal adjudication of their rights, Brennan noted that the same objection applies to each and every exercise of ancillary jurisdiction. And, he added, "[i]t should be a sufficient answer that denial of ancillary jurisdiction will impose a much larger burden on the state and federal juiciary as a whole [from separate litigation of the common issues], and will substantially impair the ability of the prospective class members to assert their claims."[59]

It is not an adequate rejoinder that state class action devices would alleviate the inefficiency and unfairness of denying small claimants access to federal court. If the state has no class action device comparable to Rule 23(b)(3), the result would be "a multitude of suits," and, lamented Brennan, "the chief influence mitigating that flood"—the fact that the cost of proceeding alone would exceed the potential value of the claim—"will do no judicial system credit."[60] Even if a state does have such a procedure, duplicative litigation in state and federal courts is likely.[61] Thus Brennan specifically looked beyond the theoretical results of interpretations of Rule 23 to the reality of the injustice suffered by those for whom the opportunity to proceed alone is no answer at all. Practicalities such as these, Brennan's dissent pointed out, were considered in *Supreme Tribe of Ben-Hur v. Cauble*[62] in allowing ancillary jurisdiction over non-diverse members of a class, once the original named plaintiffs and defendants had satisfied diversity requirements.

Brennan also demonstrated that the Court's result was compelled neither by *Snyder* nor by *Clark v. Paul Gray, Inc.*,[63] which was relied upon in *Snyder*. *Snyder*, Brennan accurately noted, turned upon whether or not jurisdiction could be established over the "action" in the first instance; the Zahns' and Leazers' action, however, was clearly cognizable in federal court on the basis of their damages alone.[64] And the *Clark* case concerned only the jurisdictional amount requirements for named plaintiffs; non-appearing class members apparently were not involved.[65]

Brennan refuted the Court's reliance upon Rule 82 as a bar to allowing the class to proceed. Noting that, from their inception, the Civil Rules have "'profoundly influenced the jurisdictional re-

59. *Id.* at 308.
60. *Id.*
61. *Id.*
62. 255 U.S. 356 (1921).
63. 306 U.S. 583 (1939).
64. Zahn v. International Paper Co., 414 U.S. 291, 309 (1973).
65. *Id.* *See also* note 52, *supra.*

sult',"[66] Brennan concluded that judicial uses of ancillary jurisdiction have liberally utilized opportunities presented by various rules, Rule 82 notwithstanding.[67]

Finally, Brennan characterized the *Zahn* majority decision as jeopardizing almost all Rule 23(b)(3) cases for which a jurisdictional amount requirement must be met.[68] The dilemma had first been noted by Chief Judge Leddy in his district court decision in *Zahn*: "the problem of defining an appropriate class over which the court has jurisdiction will often prove insuperable."[69] On the basis of the pleadings alone, it will rarely be possible to determine that each proposed member of the class satisfies the jurisdictional amount requirement. Leddy "solved" the problem by denying class status to all.[70] As Brennan would frame the dilemma faced by Leddy, how could the court determine which proposed class members were so damaged that they must receive notice of the proceeding, so they would be bound by the result? The absurd spectre of "mini-trials" to determine which proposed class members met the jurisdictional amount requirement lurks behind Brennan's words, supporting his conclusion that, after *Zahn*, intervention of class members might be necessary to establish jurisdiction—"and that is more than even the old Rule contemplated when it specified that class members had to request inclusion in order to be bound."[71]

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66. Zahn v. International Paper Co., 414 U.S. 291, 311 (1973).

67. The use of the concept of ancillary jurisdiction to expand the court's reach over an entire case is well-settled. *See, e.g.*, United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966) (related state claim may be heard with federal claim); Moore v. New York Cotton Exchange, 270 U.S. 593 (1926) (state claim, asserted as compulsory counterclaim, cognizable in federal courts though federal claim dismissed on merits); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) (if named plaintiffs satisfy diversity of citizenship requirements, claims of unnamed plaintiffs of non-diverse citizenship may be finally adjudicated).

The ancillary jurisdiction concept has evolved into a "rule of convenience and judicial economy." 61 GEO. L.J. 1327, 1332 (1973). The use of ancillary jurisdiction to reach related state claims, as in *United Mine Workers v. Gibbs*, is considerably more drastic than its use to reach claims of unnamed class members with less than $10,000 each in claimed damages. 26 VAND. L. REV. 375, 382-83 (1973).

68. Zahn v. International Paper Co., 414 U.S. 291, 311-12 (1973).

69. Zahn v. International Paper Co., 53 F.R.D. 430, 433 (D. Vt. 1971).

70. *Id.*

71. Zahn v. International Paper Co., 414 U.S. 291, 312 (1973). If the court must call in the whole proposed class to determine who has sustained $10,000 in damages, the class action no longer meets the efficiency requirement. 73 COLUM. L. REV. 359, 371 (1973).

The *Zahn* decision was required neither by the legal theories expounded in *Snyder* nor by the policy reasons underlying that earlier decision.[72] As one commentator noted, in "[a]nalyzing the issues solely in terms of traditional rules of aggregation of separate and distinct claims and the purpose of the jurisdictional amount requirement (especially in diversity cases), the Supreme Court [in *Zahn*] skillfully avoided all policy questions regarding class actions."[73] The Court feared that allowing the aggregation sought by Mrs. Snyder in class actions would shift litigation from state to federal courts, yet no such fear is justified in a *Zahn* situation: the named plaintiffs are entitled to continue in federal court, *with or without the class.*[74] Because named plaintiffs may proceed but the unnamed plaintiffs must resort to duplicative litigation on the same legal and/or factual issues in the state courts, the federal caseload would be practically unaffected by allowing *Zahn* to proceed as a class action.[75] And the argument that Rule 23 class actions must be restricted because they crowd the federal court dockets "reflects a restricted view of the national court structure since it ignores the condition of the state courts."[76]

If multiple lawsuits concerning the same harm arise in different jurisdictions as a result of the *Zahn* case, some mischievous conflicts may arise which would have been eliminated by permitting a class action to proceed. For example, if state and federal courts adjudicate separate cases affecting similarly situated plaintiffs, substantive disagreement on questions of state law may frequently ensue. Such conflicts will appear unjust to the litigants and will confuse the bench, the bar, and the public who rely upon precedent as a guide to decision making. The requirements of *Erie Railroad Co. v. Tompkins*[77] do not eliminate that problem. If there is no definitive state interpretation or, at best, outdated precedent,

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72. According to the noted commentator Charles Alan Wright, the foreclosure of the *Zahn* result by *Snyder* was "not an inevitable conclusion and it would aggravate the damaging effect the Snyder decision has had on the attempt to modernize the law of class actions." C. WRIGHT, FEDERAL COURTS § 72 (2d ed. 1970); Wright, *Class Actions*, 47 F.R.D. 169, 184 (1969).

73. 3 CLASS ACTION REPORTS 22, 23 (1974).

74. The same result would apply had the Zahns and Leazers brought their case under general federal question jurisdiction.

75. The CLASS ACTION STUDY, *supra* note 16, at 4, concluded on the basis of empirical evidence that class actions in general "have less impact on the court's workload than critics assert and at least in the District of Columbia, class actions do not appear to place an overwhelming burden on the federal district court." The Study also found scant evidence of the use of the class action device as a tool of "blackmail" in a frivolous suit. *Id.* at 22. *See* Moore, *supra* note 16, at 57.

76. 41 U. CIN. L. REV. 968, 974 (1972). *See* Moore, *supra* note 16, at 57.

77. 304 U.S. 64 (1938).

the federal courts are free to apply the law as they *think* it would be applied by the highest state court. The state courts are, of course, free to disagree with federal interpretation and often do.[78]

Moreover, the decision of the first court to rule on a matter that is pending before several courts at the behest of different but similarly situated plaintiffs may significantly influence later rulings. This subtle element in decision making was recognized by one federal court in an opinion concerning three class actions which arose out of one airplane collision. The court noted that an adjudication in which the defendant prevails is "as a practical matter" dispositive of the rights of others with identical claims who are not parties thereto only because a class proceeding was disallowed.[79]

As noted above, the great blow to consumer class actions was dealt in *Snyder*; the *Zahn* decision was simply a mop-up operation. For in practice, "[t]here are very few consumer class actions where named plaintiffs will have claims in excess of $10,000."[80] One potentially significant group of cases, however, has already been barred from the federal courts on the basis of *Zahn*.[81] With the increasing awareness and interest in matters of consumer concern by local government bodies, it is likely that increasing numbers of lawsuits may be brought on behalf of governments to recover losses suffered in their role as rather sizeable consumers of goods and services.[82] After *Zahn*, the class on behalf of whom such suits may be brought may consist only of persons with damages of $10,000 or more—few ordinary consumers are likely to be among them.

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78. 41 U. CIN. L. REV. 968, 974 (1972).

79. Petition of Gabel, 350 F. Supp. 624, 630 (C.D. Cal. 1972). Judgment for the plaintiff in one of several similar cases may also affect later adjudications. These practical consequences render the binding effect of class actions considerably less important.

80. 3 CLASS ACTION REPORT: 22, 23 (1974).

81. In Consumer Federation of America v. Wyeth Laboratories, Civil No. 306-702 (D.D.C., decided October 19, 1972), and two companion cases, two consumer groups sought to recover monies paid by all purchasers of over 100 drugs found to be ineffective by the Food and Drug Administration. Each individual's damages, of course, were small. Even the addition of Dade County, Florida, and the District of Columbia as parties plaintiff, with each of the two new plaintiffs alleging the necessary amount in controversy, was held not to cure the fatal defect.

82. Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 BUS. LAWYER 1259 (1970); *see In re* Antibiotic Antitrust Actions, 333 F. Supp. 267-324 (Multidist. 1971).

To be sure, both the *Zahn* and *Snyder* opinions apply only to those cases in which a statutory matter-in-controversy requirement is applicable. Various consumer protection statutes, including the antitrust laws, the securities laws, and the truth-in-lending laws, may be enforced by private suit in federal courts regardless of the amount of damages alleged. *Zahn* and *Snyder* do not affect class actions asserting rights under those laws. And, of course, *Zahn* and *Snyder* apply only to cases in which damages are sought. Although restitution of monetary losses and deterrence of illegal conduct are primary objectives of consumer class actions, many consumer class actions can and are formulated as claims for injunctive relief[83] terminating illegal practices or requiring certain actions in the future.

ENTER *Eisen*

In *Zahn*, the Supreme Court had construed a jurisdiction-limiting provision in a manner almost certain to increase the total volume of litigation required to resolve a given number of disputes. In *Eisen v. Carlisle & Jacquelin*,[84] however, the Court interpreted a provision designed to expand judicial cognizance of class actions in such a way that many and perhaps most such actions—at least those for damages—cannot now be maintained.

The "labyrinthian history"[85] of the *Eisen* litigation itself has become a symbol of all that is perverse in class actions.[86] After only two years of litigation, Judge Lumbard of the Court of Appeals for the Second Circuit felt constrained to characterize the case as a "Frankenstein monster posing as a class action."[87] Six years after that denunciation, the Supreme Court remanded the case to the district court.[88] The parties had still not reached the merits and it was entirely possible that the litigation would begin anew.[89]

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83. *See, e.g.*, New Jersey Welfare Rights Organization v. Cahill, 483 F.2d 723, 725 n.2 (3d Cir. 1973); Yanez v. Jones, 361 F. Supp. 701, 706 (N.D. Utah 1973).

84. 94 S. Ct. 2140 (1974) [hereinafter cited as *Eisen IV*].

85. *Id.* at 2144.

86. The *Eisen* case has inspired an abundance of commentary. *See, e.g., Eisen v. Carlisle & Jacquelin—Fluid Recovery, Minihearings and Notice in Class Actions*, 54 B.U.L. REV. 111 (1974); *Manageability Crisis of Consumer Class Actions: The Severe Example of Eisen III*, 7 IND. L. REV. 361 (1973); Recent Developments, 73 COLUM. L. REV. 359 (1973); Comment, *Zahn v. International Paper: A Further Limitation on Class Action Jurisdiction*, 41 FORDHAM L. REV. 991 (1973).

87. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 572 (2d Cir. 1968) [hereinafter cited as *Eisen II*].

88. *Eisen IV*, 94 S. Ct. at 2153.

89. Because the plaintiff had refused to bear the costs of the required notice to the class, the Court remanded with instructions to dismiss the class

Morton Eisen commenced suit in May 1966 in the United States District Court for the Southern District of New York. He brought the suit as a class action under Rule 23,[90] alleging that the main defendants, two brokerage firms which accounted for virtually all odd-lot transactions on the New York Stock Exchange, had monopolized odd-lot trading and exacted excessive fees in violation of Sections 1 and 2 of the Sherman Act.[91] The complaint defined the class as all buyers and sellers of odd-lots on the Exchange (this was later limited to traders during a four-year period[92]) and sought treble money damages and injunctive relief termininating the excessive charges.

Eisen I

In the first phase of the litigation, the district court refused to permit plaintiff to maintain the suit as a class action.[93] It first noted the size and diversity of the class, as defined by Eisen, and concluded that Eisen therefore could not adequately represent it.[94] The court then buttressed this conclusion, stressing that the notice requirements of Rule 23(c) could not be met by Eisen and that "questions affecting individual members predominate over questions common to the class." All of these factors, the court held, "suggest almost insuperable difficulties in fair and proper management of this suit as a class action."[95] On appeal, the court of appeals denied a motion to dismiss the appeal, holding that the district court's order denying class status was a "final [decision]

action "as so defined," but invited plaintiff to attempt a redefinition of his class. *Id.* at n.16.

90. Plaintiff initially alleged that the action met the requirements of each of the three subdivisions of Rule 23(b).

91. 15 U.S.C. §§ 1, 2. He also named the New York Stock Exchange as a defendant, alleging violation of provisions of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78f, 78aa and seeking unspecified damages.

92. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 261 (S.D.N.Y. 1971) (Tyler, J.).

93. Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147 (S.D.N.Y. 1966) (Tyler, J.).

94. The court did not explain how that size and diversity militated against adequate representation by Eisen. *Id.* at 151.

95. As to the "common questions" issue, the court did little more than note the size of the class and the apparent lack of interest by class members in the litigation. *Id.*

appealable as of right"[96] because it was, as a practical matter, the "death knell" of the suit.[97]

Eisen II

Reaching the merits, the court of appeals reversed and remanded to the district court for an evidentiary hearing on whether the suit should be maintained as a class action under Rule 23(b)(3)[98] in view of the requirements of adequacy of representation (Rule 23(a)(4)), "manageability" of the class (Rule 23(b)(3)(D)), and notice to members of the class (Rule 23(c)(2)).[99]

The court of appeals majority rejected Judge Tyler's reasoning that the size of the class and the failure of other class members to intervene justified an inference of inadequate representation. The appellate court noted that Rule 23 was intended to apply to such situations and that other provisions of the Rule, such as that requiring court approval of settlements, safeguarded the interests of absent class members.[100] The court likewise rejected the notion that class size and diversity and lack of intervention necessarily implied the absence of predominantly common questions of law and fact.[101] On the question of notice, which the court of appeals acknowledged to be "the most serious obstacle to the maintenance of the present action,"[102] the court provided no clear guidelines. While requiring an evidentiary hearing to determine which class members could be identified with what degree of effort, the court raised an intriguing possibility. Publication might be the "best notice practicable" even for those class members who could be identified, the court mused, particularly where individual notice "would, in effect, prevent potentially meritorious claims from be-

96. 28 U.S.C. § 1291.

97. Eisen v. Carlisle & Jacqueline, 370 F.2d 119, 121 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967) [hereinafter cited as *Eisen I*]. The Supreme Court later phrased the "death knell" concept another way. Noting that the plaintiff's own stake in the case was only $70, the Court stated: "Economic reality dictates that petitioner's suit proceed as a class action or not at all." *Eisen IV*, 94 S. Ct. at 2144.

98. The court of appeals found that since members of the class were unlikely to bring individual suits, and since Eisen's claim was primarily for damages, Rule 23(b)(1) and (b)(2) were inapplicable to the instant action. *Eisen II*, 391 F.2d at 564-65.

99. *Id.* at 570. The court of appeals purported to retain appellate jurisdiction pending remand, *id.*, an action whose propriety the Supreme Court found unnecessary to reach when the issue later arose in *Eisen IV*. 94 S. Ct. at 2149.

100. *Eisen II*, 391 F.2d at 562-64.

101. *Id.* at 564-68.

102. *Id.* at 568.

ing litigated."[103] Having made this suggestion, however, the court immediately suggested precisely the contrary:

> Nevertheless, if the court finds that a considerable number of members of the class can be identified with reasonable effort, and financial considerations prevent the plaintiff from furnishing individual notice to these members, there may prove to be no alternative other than the dismissal of the class suit.[104]

The court did not indicate any basis for choosing, on remand, between these two possibilities.

Upon remand, the district court made "extensive findings of fact"[105] and concluded that the suit could indeed be maintained as a class action under Rule 23(b)(3).[106] After finding that plaintiff would adequately represent the class,[107] Judge Tyler ruled that the "manageability" problem, consisting chiefly of the difficulties attendant upon computation of damages, processing of claims, and distribution of any eventual recovery, would not be insuperable. In particular, he concluded that the distribution problem could be resolved by resort to a so-called "fluid class recovery," whereby a fund equivalent to the amount of unclaimed damages would be established and defendants' odd-lot differential reduced in an amount determined by the court until such time as the fund was depleted.[108]

It was Judge Tyler's treatment of the notice issue, however, that was to constitute the focus of the court of appeals decision in *Eisen III*[109] and the Supreme Court's opinion in *Eisen IV*.[110] The notice issue really consisted of three component issues: What type of notice was required for which class members? Who must bear the

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103. *Id.* at 570.
104. *Id.*
105. *Eisen IV*, 94 S. Ct. at 2147.
106. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 261 (S.D.N.Y. 1971).
107. *Id.* at 260-61.
108. *Id.* at 264-65. As precedent for the "fluid class recovery," the court cited Bebchick v. Public Util. Comm'n, 318 F.2d 187 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963); West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *approval of settlement affirmed*, 440 F.2d 1079 (2d Cir. 1971); and Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).
109. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), *petition for rehearing and rehearing en banc denied*, 479 F.2d 1020 (1973) [hereinafter *Eisen III*].
110. *Eisen IV*, 94 S. Ct. 2140 (1974).

cost of providing notice? And at what point must the notice be given?

As to the first question—the type of notice required—Rule 23(c)(2) provides that, at least with respect to those class members "who can be identified through reasonable effort," individual notice is essential. But since approximately 2,250,000 of some 6,000,000 class members could "be identified with reasonable effort," reaching only those would cost some $225,000,[111] not to mention the additional cost of publication notice to the others.

Stressing cases holding that due process requirements are "flexible . . . and must be applied on a case-by-case basis" to ensure fairness to all relevant interests, the court concluded that Rule 23(c)(2) simply reaffirmed this principle with respect to notice.[112] It then noted a fact of overriding practical significance, which the Supreme Court was nevertheless to find legally irrelevant:[113]

> In light of these purposes, it naturally follows that as the size of potential recovery available to each class member diminishes, any incentive class members may have to respond to the notice also diminishes. See Berland v. Mack, 48 F.R.D. 121, 129 (S.D.N.Y. 1969). Consequently, where a class consists of a large number of claimants with relatively small individual claims, notice to individual class members, as a legal and practical matter, becomes less important and need not be unduly emphasized or required . . .
>
> Finally, in determining what kind of notice is required by due process and Rule 23(c)(2), it must be recalled that expensive and stringent notice requirements could vitiate the class action device in situations where application thereof as a matter of public policy can be important, such as private antitrust, consumer, and environmental litigation. [citations omitted][114]

The court thus devised a hierarchy of notice: (1) individual mailed notice to all member firms of the New York Stock Exchange, all commercial banks with large trust departments, the approximately 2000 class members with ten or more transactions during the relevant period, and 5000 others selected at random from the identifiable members of the class; and (2) notice by publication in four prominent newspapers. The court also stated that the response to this initial notice might raise questions as to the adequacy of Eisen's representation, questions which might necessitate additional notice.[115]

Judge Tyler then directly confronted the second notice question

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111. At the then prevailing first class postage rate of six cents.
112. Eisen v. Carlisle & Jacquelin, 52 F.R.D. at 265-66.
113. *See* text accompanying note 134, *infra*.
114. Eisen v. Carlisle & Jacquelin, 52 F.R.D. at 266.
115. *Id.* at 268.

—the difficult issue of allocation of the cost of notice.[116] Asserting that the allocation question was still "an open one" (notwithstanding the Second Circuit's unequivocal contrary opinion in *Eisen II*[117]), that the private treble damage action was an essential element of antitrust enforcement policy, that the statute of limitations had run against the class claims,[118] that Rule 23 was to be given a liberal construction, that a large number of individuals were affected by the challenged practice, that a class action would provide important *res judicata* benefits for defendants, and that "it would be unfair to tax plaintiff with the cost of paying for notice at this point,"[119] the court held that defendants should share in the initial costs of furnishing notice. As a means of determining the precise allocation of costs, however, a preliminary hearing on the merits (later called a "mini-hearing") was "superior to other possible procedures" and must first be conducted.[120] At the conclusion of this hearing, the court held that "[p]laintiff and the class he represents are more than likely to prevail at trial, [and] that defendants should bear 90% of the costs of . . . notice to the class."[121]

The third notice question—at what point in the litigation must notice be given—was addressed only briefly and inadequately by

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116. For a discussion of the rationale for requiring a defendant to bear costs of notice under certain circumstances, *see* Dolgow v. Anderson, 43 F.R.D. 472, 497-500 (S.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1971).

117. *Eisen II*, 391 F.2d at 568. Judge Tyler glossed over that contrary opinion, relying upon a subsequent Second Circuit opinion, Green v. Wolf Corp., 406 F.2d 291, 301 n.15 (1968). Eisen v. Carlisle & Jacquelin, 52 F.R.D. at 269. But in the *Green* case, the Second Circuit noted that plaintiff was willing to bear the costs of notice, thus obviating any need to consider the issue of allocation. 406 F.2d at 301 n.15. To say that a question is "an open one" simply because a court finds it unnecessary to reach it is a curious doctrine.

118. This conclusion is no longer correct. *See* American Pipe & Construction Co. v. Utah, 414 U.S. 538, 554 (1974):

> We are convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.

See Eisen IV, 94 S. Ct. at 2154 (separate opinion of Douglas, J.).

119. Eisen v. Carlisle & Jacquelin, 52 F.R.D. at 270.

120. *Id.* at 271-72. There was some, but not much, precedent for this device. *See* Dolgow v. Anderson, 43 F.R.D. 472, 501-02 (S.D.N.Y. 1968).

121. Eisen v. Carlisle & Jacquelin, 54 F.R.D. 565, 573 (S.D.N.Y. 1972).

the district court,[122] and was not dismissed at all by the court of appeals or the Supreme Court. It is discussed at some length below.[123]

Eisen III

When the case returned to the court of appeals for the second time, Judge Tyler's heroic efforts to preserve the litigation as a class action were assailed and utterly rejected. Writing for the panel, Judge Medina issued a choleric denunciation of virtually all of the district court's actions on remand and held:

> If identification of any number of members of the class can readily be made, individual notice to these members must be given and Eisen must pay the cost. If this cannot be done, the case must be dismissed as a class action.[124]

The court of appeals panel concluded that Judge Tyler's departure from the requirement of actual individual notice to identifiable class members was in "complete disregard of our specific and unambiguous ruling on the subject."[125] In the view of the court, this error "alone" compelled reversal and dismissal of the class action.[126] The court's additional observation—that Rule 23 did not authorize either a preliminary mini-hearing on the merits or a fluid class recovery,[127] that the case was unmanageable as a class action,[128] and that there might be circumstances in which the class plaintiff might not be obligated to bear all costs of providing Rule 23 notice—must be considerd *dicta.*[129]

Eisen IV

On review, the Supreme Court first considered the question whether the Second Circuit in *Eisen III* had properly invoked its appellate jurisdiction in reviewing Judge Tyler's order permitting the suit to proceed as a class action and allocating the notice costs. Relying upon its earlier holding in *Cohen v. Beneficial Loan Corp.*,[130] the Court concluded that the ruling on notice costs had been sufficiently dispositive of defendants' contentions on costs

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122. *See* Eisen v. Carlisle & Jacquelin, 52 F.R.D. at 271.
123. *See* text accompanying notes 148-78, *infra.*
124. *Eisen III*, 479 F.2d at 1015.
125. *Id.*
126. *Id.*
127. *Id.* at 1018. The court viewed the fluid class recovery as constitutionally defective as well.
128. *Id.* at 1016-18. The conclusion of unmanageability was strengthened by the Court's rejection of the fluid class recovery.
129. *Id.* at 1009 n.5.
130. 337 U.S. 541 (1949).

and sufficiently separable from the main cause of action as to constitute a "final decision" appealable as of right under 28 U.S.C. § 1291.[131] This conclusion, together with the Court's finding that "[e]conomic reality dictates that petitioner's suit proceed as a class action or not at all,"[132] appears to uphold the "death knell" doctrine set forth in *Eisen I*.[133]

Turning to the merits of the notice issue, the Court first rejected Eisen's contentions that the size of the class made individual notice impracticable, that absent members who did not receive notice would not be prejudiced since their average stake would be too small to induce them to opt out of the class, and that adequacy of representation, not notice, was the core purpose of Rule 23. Relying upon the language of the first sentence of Rule 23(c)(2), the Court held explicitly that ". . . individual notice be sent to all class members who can be identified with reasonable effort."[134]

Next, the Court considered the district court's allocation of notice costs after the preliminary "mini-hearing" on the merits.[135] It noted that neither the language nor the history of Rule 23 authorized such a procedure, that Rule 23(c)(1) in fact required that class certification be done "as soon as practicable after the commencement of [the] action," and that the "usual rule" required that plaintiffs initially bear the cost of notice to the class. Distinguishing the cases cited by the district court in which cost allocation was endorsed, the Court noted that they had involved fiduciary relationships between plaintiff and defendant:[136]

> Where, as here, the relationship between the parties is truly adversarial, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit.[137]

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131. *Eisen IV*, 94 S. Ct. at 2149-50. *See also* notes 96-97 *supra*, and accompanying text.
132. 94 S. Ct. at 2144.
133. *See* note 97 *supra*, and accompanying text.
134. *Eisen IV*, 94 S. Ct. at 2152. In dictum, the Court also found that individual notice was "clearly the 'best notice practicable' within the meaning of Rule 23(c)(2) and our prior decisions," *id.* at 2151, a superfluous finding with respect to those members who could be "identified through reasonable effort."
135. *See* note 121 *supra*, and accompanying text.
136. *See* Eisen v. Carlisle & Jacquelin, 52 F.R.D. at 269-70. The Supreme Court expressly declined to opine on the proper allocation of costs in such cases. *Eisen IV*, 94 S. Ct. at 2153 n.15.
137. *Eisen IV*, 94 S. Ct. at 2153.

Recalling that Eisen steadfastly refused to bear the cost of notice to members of the class as originally defined, the Court remanded for dismissal of the class action "as so defined" and expressly noted that a smaller "subclass" meeting the requirements of Rule 23 might possibly be defined and that dismissal was "without prejudice" to efforts by Eisen to redefine the class either under Rule 23(c)(4)[138] or Rule 15.[139]

Eisen IV: Unanswered Questions

For all its clarity and unanimity, the Supreme Court's opinion in *Eisen IV* leaves open a great many fundamental questions concerning *Eisen*-type class actions. Indeed, one is tempted to conclude that the only proposition authoritatively settled in *Eisen IV* was that when Rule 23(c)(2) required "individual notice to all members who can be identified through reasonable effort," it did indeed mean "individual notice" and "all." Many other uncertainties, however, still remain.

Can massive consumer class actions like *Eisen* ever be "manageable" within the meaning of Rule 23? Is the fluid class recovery still a viable remedy and can its availability render class actions "manageable" which otherwise would be "unmanageable"? Under what circumstances may the costs of Rule 23 notice be allocated among the parties? What form of notice is required for those class members who *cannot* be identified "through reasonable effort" and what does "reasonable effort" mean? What form of notice, if any, is required in class actions brought under Rule 23(b)(1) and (b)(2)? At what point in a putative class action must individual notice be given? To what extent can the harsh result in *Eisen IV* be blunted by resort to redefinition of the class? Will the statute of limitations toll while the class is redefined? We discuss several of these issues below.

Manageability

Because the Court required individual notice to the 2,250,000 class members who were "easily ascertainable" and because Eisen flatly refused to furnish such notice, it was unnecessary to decide whether this mammoth class, composed largely of small investors,

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138. *Id.* at 2153 n.16. Although the Court invited petitioner's efforts to redefine the class, Justice Douglas, in his separate opinion, stressed the discretion of the court in doing so on its own initiative. *See* text accompanying note 183, *infra.*

139. Permitting amendment and supplementation of pleadings.

met the manageability requirements of Rule 23. The Court expressly declined to reach this question[140] and also expressly declined to address the issue of fluid class recovery.[141] And since the court of appeals decision in *Eisen III* was vacated, no holding on these questions remains. As one commentator has noted:

> [T]he Eisen III decision—with its offensive language and its holding against the fluid class recovery—has been *vacated.* Thus, it is no longer the law in the Second Circuit. Similarly, the Medina Panel's dicta calling the class unmanageable because the average member's claim is only $3.90 was also vacated.
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> . . . But by leaving the manageability issue open, the Court has made possible two rulings: that the defendants, if they lose, are liable for the full cost of distributing damages as part of the cost of suit and the damages of each class member can be computed on the basis of an average overcharge formula. [footnote omitted].[142]

It would appear that the question of manageability will continue to be resolved on a case-by-case basis and that the device of a fluid class recovery will remain available in appropriate cases for facilitating distributional problems, particularly where, as in *Eisen,* large numbers of class members have each incurred trivial damage. The difficulties with the fluid class recovery, both practical and conceptual, are great, however, and considerably more experience will be necessary to permit a full evaluation.[143]

Allocation of Notice Costs

In *Eisen IV*, the Supreme Court squarely held that, at least where "the relationship between the parties is truly adversarial," plaintiff must pay for the cost of notice to the class.[144] It left open the question of whether allocation would be appropriate in other cases, noting only that the cases cited by the district court involved fiduciary relationships between the parties.[145] In between the "truly adversarial" relationship and the fiduciary relationship,

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140. *Eisen IV*, 94 S. Ct. at 2150 n.10.
141. *Id.*
142. SUBCLASS ACTION REPORTS, Interim Bulletin No. 3, at 2 (1973).
143. For some of the difficulties associated with the fluid class recovery concept, *see* NICJ STAFF REPORT, supra note 6, at 182-201 and sources there cited.
144. *Eisen IV*, 94 S. Ct. at 2153.
145. *Id.*

however, lie a large number of possible class actions, the most obvious category being consumer suits to recover overcharges against regulated public utilities.[146] In such cases, allocation to defendant of a portion of the costs of notice may be justifiable, particularly in view of the estoppel advantages to defendants from notice to the class.[147]

At What Point Must Notice Be Given?

While it did not directly address the question of when the individual notice must be given and the issue was not briefed by the parties,[148] the Court's opinion, with its firm rejection of any "preliminary inquiry into the merits of a suit" prior to certification and its emphasis on the right of class members to opt out or "perhaps participate in the management of the action,"[149] strongly suggests that Rule 23(c)(2) notice must be given promptly after the class is certified.

In reaching this conclusion, the Court was resolving a false dilemma. By constructing for itself a Hobson's choice—*either* require Eisen to furnish individual notice to 2,250,000 absent class members immediately or dismiss his class action complaint—the Court blinded itself to other possible options which could avoid either of these Draconian solutions.

Eisen and other class action plaintiffs with small individual claims who represent large numbers of people understandably resist bearing the costs of individual notice so long as the outcome of the litigation remains in doubt. By the same token, members of the class are entitled to notice if they are to be bound by the judgment. These interests of both Eisen and the absent class members, however, can be substantially protected if the individual notice is not required to be given until *after* the issue of liability is determined.

Delayed Notice: Better Late than Never

Under this approach, the plaintiff would litigate his case on the

146. *See, e.g.*, Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

147. *See* Dolgow v. Anderson, 43 F.R.D. 472, 499 (S.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1971).

148. The issue was briefed by amici curiae Public Citizen, Inc. and Consumers Union of United States, Inc. Much of the discussion that follows reflects arguments made in that brief.

149. *Eisen IV*, 94 S. Ct. at 2152.

merits following certification of the class.[150] After certification, some notice short of that required in *Eisen IV* would be given to the class members. The form and extent of notice would be a matter for the court's discretion and would probably include publication and limited individual notice.[151] This notice would be calculated to reach the members with the largest stake in the outcome of the litigation. (In the *Eisen* case, these would include the member firms of the Exchange, the commercial banks with large trust departments, and large traders). Those members receiving notice would intervene, "opt out", or do nothing, as they wished. If plaintiff prevailed on the liability issue, damages and/or equitable relief would be ascertained and granted, and appeals could be taken. If defendant prevailed on the liability issue, appeals could likewise be taken.

If plaintiff prevailed on appeal, the case would be returned to the district court for assessment of the class's damages. At this point, notice under Rule 23(c)(2), including individual notice to those members readily ascertainable, would be required. The cost of notice would probably be borne by defendant, since defendant's liability would already have been established. Plaintiff would not have had to bear those costs unnecessarily in a losing cause. And, the members of the class would have an opportunity to obtain their damages.

If defendant prevailed on appeal, only a generalized notice to the class informing its members of the outcome would be necessary. The cost would be relatively small and plaintiff would properly bear it.

The virtues of the delayed-notice approach are obvious. It would avoid the enormous waste of requiring expenditures for notice to large numbers of persons which turn out to be unnecessary when defendant prevails on the merits. It would also obviate the necessity to decide questions of allocation of costs. Most important, it would enable *Eisen*-type class actions to proceed to a determination of liability.

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150. FED. R. CIV. P. 23(c)(1) requires certification of the class "[a]s soon as practicable after the commencement of an action. . . ." In *Eisen IV*, the Court stressed this requirement for an early determination of the certification issue. 94 S. Ct. at 2152.

151. *See, e.g.*, the notice required in Eisen v. Carlisle & Jacquelin, 52 F.R.D. at 267-68.

Several objections to delayed notice, however, can readily be anticipated. Indeed, Judge Tyler considered and rejected this approach.[152] He gave three reasons for rejecting it. First, he found it "at least theoretically contrary to the language of Rule 23 calling for an early determination of the class action question." Rule 23, however, only requires early determination of the *certification* question, *i.e.*, whether the action is to be "maintained" as a class action.[153] Nothing in Rule 23 requires that full, individual notice be given at an early stage, though in the normal case, early notice clearly should be required. Indeed, Rule 23(d)(2) authorizes the court to require

> for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members . . . of the opportunity of members . . . to intervene and present claims or defenses, or otherwise to come into the action. . . .

An order under Rule 23(d)(2) "may be altered or amended as may be desirable from time to time." And while the Advisory Committee's Note to Rule 23(d)(2) suggests that an order under (d)(2) is subject to the due process requirements of notice contained in (c)(2), nothing contained therein precludes individual (c)(2) notice from being delayed until after liability is determined.[154]

Judge Tyler's second objection to the delayed notice approach was that "in effect it amounts to 'one-way intervention', a procedure the rule was designed to avoid."[155] But "one-way intervention"—in which the class member is permitted to intervene to secure the benefit of an existing decision advantageous to him but is not bound by an unfavorable decision—is not entailed by the delayed notice approach described above. *All* members of the class would be presumptively bound,[156] except for those who opted out of the class prior to a decision on liability.

Judge Tyler's third objection, and the most substantial one, was that "counsel for other class members may desire to participate at an early stage."[157] However, the delayed notice approach, as noted above, would require, immediately upon certification of the class, a generalized form of notice—usually, but not always, less than individual notice——calculated to reach most or all class mem-

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152. *Id.*, at 271.
153. FED. R. CIV. P. 23(c)(1).
154. *Proposed Rules of Civil Procedure*, 39 F.R.D. 69, 106-07 (1966).
155. Eisen v. Carlisle & Jacquelin, 52 F.R.D. at 271.
156. *See* text accompanying notes 168-70, *infra*, for discussion of circumstances under which the estoppel effect could be vitiated.
157. Eisen v. Carlisle & Jacquelin, 52 F.R.D. at 271.

bers with significant claims, as well as some other members.[158]

It must be conceded that this preliminary notice might well not reach all members with substantial interest in the litigation and would certainly fail to reach all members of the class. And it is precisely at this point that some hard choices must be made. Several facts, however, are relevant to those choices.

First, it is true almost by definition that in the *Eisen* type of class action under analysis here, few members of the class will, as a practical matter, have a significant stake in the outcome of the litigation.[159] As Professor Kaplan pointed out, the right to opt out of the class and proceed on one's own is "no more than theoretic where the individual stake is so small as to make a separate action impracticable."[160] Under the delayed notice approach, class members would be relinquishing this purely theoretical and thus essentially valueless right to participate in the management of the litigation on the merits, while obtaining in return a very real benefit: their cause of action would actually be litigated and they might actually share in an eventual recovery.

Second, any possibility of prejudice to an absent class member who failed to receive the preliminary notice would be substantially, if not wholly, removed by the previous findings by the court, prerequisite to certification of a class action, that, *inter alia*, "the representative parties will fairly and adequately protect the interests of the class," that their claims or defenses are "typical" of those of the class, and that "there are questions of law or fact common to the class."[161]

In *Eisen IV*, the Supreme Court considered these two arguments, but quickly rejected them. To the argument that the class members lack any incentive to opt out of the class and that they therefore give up nothing, the Court answered that (c)(2) notice was "an unambiguous requirement of Rule 23" and was necessary to af-

158. *See* text accompanying note 151, *supra*.
159. Class members with a significant stake in the outcome not only would probably receive the preliminary, generalized notice directed at them, but might well be motivated to institute a class action (or, in unusual cases, an individual action) independently.
160. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 391 (1967).
161. FED. R. CIV. P. 23(a).

ford class members the opportunity to opt out.[162] Similarly, Eisen had contended that adequacy of the representation obviated the necessity for Rule 23 notice. This argument was also rejected on the ground that Rule 23 required both notice *and* adequacy of representation and that the argument implied that *no* notice need be given.[163]

The Court's reasoning on these points is not persuasive. If Rule 23 unambiguously requires notice, it does not require it at the time that the class is certified.[164] Nor is it sensible to construe Rule 23 otherwise in order to preserve a right to opt out that is almost purely theoretical and which will, if preserved in that fashion, have the practical effect of precluding *any* action from being maintained. Finally, the assurance of adequate representation does not imply that no notice need be given; it suggests only that full notice can safely be *delayed* without violating due process guarantees.

A third practical consideration—perhaps the most important of all—is that to require that all class members be notified at the time of certification in order to permit them to opt out is to ensure that *Eisen*-type class actions will not in fact be brought.[165] As the Court recognized at the outset of *Eisen IV*,

> . . . petitioner's individual stake in the damage award he seeks is only $70. No competent attorney would undertake his complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.[166]

When, in evaluating the importance of the interest in preserving the ability of absent class members to opt out of such cases, one realizes that the alternative is probably no suit at all and a vitiation of the substantive rights involved, that interest would appear to be entitled to relatively little weight. This is particularly true in light of the practicalities noted above. It is one thing to argue that the framers of Rule 23 intended that, in the ordinary case, individual notice should be given as soon as possible after certification. It is quite another thing, however, to contend that they would not have regarded delayed individual notice as preferable to no class action at all in an *Eisen*-type case otherwise meeting the stringent requirements of Rule 23.[167]

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162. *Eisen IV*, 94 S. Ct. at 2152.
163. *Id.*
164. Although, as noted above, this should certainly be the practice in the normal class action.
165. Unless Justice Douglas's suggestions for "subclass" actions are realized. *See* text accompanying notes 179-87, *infra*.
166. *Eisen IV*, 94 S. Ct. at 2144.
167. *See* Dolgow v. Anderson, 43 F.R.D. 472, 497-98 (S.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1971).

There is yet another reason why solicitude for the interests of absent class members need not lead to rejection of delayed notice. In fairness to defendants and in order to avoid the "one-way intervention" that the 1966 Amendments were designed to avoid, the decision on the merits should bind not only the parties to the action but all members of the class as well.[168] And in the ordinary case, a plaintiff seeking to litigate an issue whose merits were determined in a prior class action brought on his behalf would—and should—be estopped from doing so.

The estoppel effect of a decision on the merits, however, cannot be conclusively determined by the court rendering that decision; the estoppel can only be imposed in the subsequent action. As the Advisory Committee noted:

> Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c) (3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action. See Restatement, *Judgments* §86, comment (h), §116 (1942). The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of *res judicata* are less likely to be raised at a later time and if raised will be more satisfactorily answered.[169]

In the subsequent action, as Judge Frankel has pointed out, "at least the basic considerations going to the fairness of holding [absent members of the class in the earlier action] bound will be open for re-examination. Factors which were not brought to the attention of the first court—including, most centrally, the adequacy of representation in the first suit . . . —may lead to a changed perspective . . . [and] the inevitable mistakes and omissions are subject to correction in fairly standard and unaltered ways."[170]

Given these practical considerations—the generalized preliminary notice to be directed at those absent class members with the largest stake in the litigation, the very small probability that absent class members will want to opt out of an *Eisen*-type class action, the required court findings concerning adequacy of representation and typicality of claims, the near certainty that a requirement of individual immediate notice will end the action completely, and the

168. *See* text accompanying note 11, *supra.*
169. *Proposed Rules of Civil Procedure,* 39 F.R.D. 69, 106 (1966).
170. *Supra* note 1 at 46-47.

ability of absent class members to prevent a subsequent estoppel of their individual claims if binding them would be demonstrably inequitable—it is difficult to credit the argument that delayed notice would violate the due process rights of absent class members presumptively bound by a judgment, particularly when the alternative course will assure that their claims cannot be litigated at all.

Still less would the rights of class action defendants be jeopardized by delayed notice. The only legitimate interest of the defendant in the notice requirement is that all members of the class be bound by a decision on the merits in the defendant's favor. And, as noted above, the delayed notice approach would bind all members of the class to the extent that any given judgment can bind anyone.[171] An absent class member could, of course, decide to institute a subsequent suit against the successful class action defendant. This possibility, however, would be exceedingly remote——indeed, far more remote than the possibility that Eisen or any other member of his class would have maintained an individual action in the first instance.[172] For in addition to the financial disincentives to such a suit, the difficulty in convincing a court that he should not be estopped by the prior judgment, and statute of limitations problems, the plaintiff in the subsequent action would confront the most formidable obstacle of all—the stare decisis effect of the prior decision.[173] Only an extraordinarily wealthy, quixotic, and masochistic plaintiff would undertake such a fruitless endeavor.[174]

Under these circumstances, the delayed notice approach cannot reasonably be regarded as a violation of the due process rights of absent class members.[175] All legitimate interests of all parties——

171. *See* text accompanying notes 169-70, *supra.*

172. The Supreme Court regarded this as no possibility at all. *See* text accompanying note 166, *supra.*

173. ". . . it may not be irrelevant to recall that as a practical matter countless people are being bound every day as a result of *stare decisis* following lawsuits in which they did not participate." Frankel, *supra* note 1, at 46.

174. Realizing this, defendants in class actions often move for summary judgment before the class is even certified, knowing that if defendant prevails on the merits, no other class member will bring a subsequent suit even if they are not estopped by the prior judgment from doing so. *See, e.g.,* Partain v. First National Bank of Montgomery, 336 F. Supp. 65 (M.D. Ala. 1971), *rev'd,* 467 F.2d 167 (5th Cir. 1972); Ditlow v. Pan American World Airways, Inc., CA 999-73 (D.D.C.), *pending on appeal,* No. 73-1396 (D.C. Cir.).

175. Certainly, the cases relied upon by the Supreme Court in *Eisen IV,* 94 S. Ct. at 2150-51, namely Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) and Schroeder v. City of New York, 371 U.S. 208 (1962), did not compel that conclusion on the facts of *Eisen.* *See* Jacoby & Cherkasky, *The Effects of Eisen IV and Proposed Amendments of Federal Rule 23,* 12 SAN DIEGO L. REV. 1, 12 (1974).

present and absent—would be protected. The alternative—dismissal of the action,[176] and thus of the substantive rights sought to be vindicated thereby—is really no alternative at all and surely should be regarded with suspicion under a rule which is designed to provide a flexible, creative response to the small claim phenomenon:

> It is neither a set of prescriptions nor a blueprint. It is, rather, a broad outline of general policies and directions. As the commentators have said, it confides to the district judges a broad range of discretion.[177]

Several courts have exercised this discretion by providing for some variant of the delayed notice approach.[178] However, in view of the Supreme Court's clear and unequivocal holding in *Eisen IV* that individual notice is required, and its apparent holding that such notice must be given promptly after certification of the class, an amendment to Rule 23 will be required to authorize such an approach in the future.

Subclass Actions: Thinking Small

Until such time as Rule 23 is modified to overrule *Eisen IV*, the principal hope for class action plaintiffs must rest on the strategy adumbrated by Mr. Justice Douglas in *Eisen IV*. Speaking for Justices Brennan and Marshall as well, Douglas wrote a separate opinion concurring and dissenting in part.[179] Resonating a theme sounded by two dissenting judges in *Eisen III*,[180] Douglas stressed the increased importance, after *Eisen IV*, of Rule 23(c)(4)(B), which provides that "[w]hen appropriate . . . a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

A district court, in Douglas's view, possesses ample discretion to

176. *But see* text accompanying notes 179-87, *infra*.
177. Frankel, *supra* note 1, at 39.
178. *See, e.g.*, Alameda Oil Co. v. Ideal Basic Industries, Inc., 326 F. Supp. 98, 105 (D. Colo. 1971); Cusick v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 317 F. Supp. 1022, 1024-27 (E.D. Pa. 1970).
179. *Eisen IV*, 94 S. Ct. at 2153-57.
180. Judges Oakes and Timbers were not on the panel which rendered the *Eisen III* opinion, but dissented from denial of rehearing en banc. 479 F.2d at 1021.

play "an active role" in shaping the contours of an unmanageable class action in order to render it manageable in some other form. This discretion derives both from its power to alter or amend its class action order before a decision on the merits (Rule 23(c)(1)) and from its power to divide a class into subclasses (Rule 23(c)(4)). Most important, in this view, the court may exercise this discretion at its own instance at any time prior to the decision on the merits, and "no new action need be started nor any amended complaint filed."[181]

While the distinctions between Douglas's position and that of the majority are not entirely clear, two differences may prove consequential. The majority's order on remand was the dismissal of the complaint "without prejudice to *any efforts petitioner may make to redefine his class* either under Rule 23(c)(4) or Fed. Rule Civ. Proc. 15."[182] Douglas, on the other hand, would neither dismiss the complaint nor require that Eisen—as distinguished from the trial court—initiate the redefinition of the class. Douglas would not dismiss the complaint but would simply permit the court, either on motion or sua sponte, to proceed to the merits "with the class action held in abeyance."[183]

If Douglas's position prevailed, the statute of limitations might not begin to run anew against the members of the class so long as the subclass action continued to pend, a matter of practical importance in the *Eisen* case[184] and, presumably, in many other class actions as well. While readily conceding that this issue (and the issue of collateral estoppel in such a case) was not reached in *American Pipe and Construction Co. v. Utah*,[185] decided earlier in the term, Douglas leaves little doubt that, in his view, tolling the statute pending prosecution of the subclass action would be wholly consistent with "the purpose of the statute of limitations."[186] If the statute is tolled and the subclass prevails on the liability issue, other subclasses might well be able to intervene and take advantage of that judgment without being barred by the statute.[187]

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181. *Eisen IV*, 94 S. Ct. at 2155.
182. *Id.* at 2153 n.16 (emphasis added).
183. *Id.* at 2154 n.2.
184. "The statute of limitations, it is argued, has run or is about to run on many of these classes." *Id.* at 2154 (separate opinion of Douglas, J.).
185. 414 U.S. 538 (1974).
186. *Eisen IV*, 94 S. Ct. at 2154 n.2.
187. Whether such intervenors could assert collateral estoppel affirmatively against a defendant was not decided in *Eisen IV*. For a pre-*Eisen IV* holding that they can, *see* Katz v. Carte Blanche Corp., 496 F.2d 747 (3rd Cir. 1974) (en banc). Regardless of any estoppel effect, however, the stare decisis effect would doubtless be great.

In that event, the "subclass action" approach and the "delayed notice" approach would yield much the same result. By permitting the common issues to be litigated on the merits, before imposing procedural burdens which may ultimately prove to be unnecessary or, if necessary, may then become feasible, both approaches preserve the viability of the class action vehicle in the *Eisen*-type situation. To the extent that the "subclass action" approach outlined by Justice Douglas can be implemented without amendment of Rule 23, that strategy is obviously preferable.

CONCLUSION

The triad of cases discussed above leaves two yawning voids in the consumer protection fabric of federal jurisprudence. *Snyder* and *Zahn* effectively deny access to the federal courts to any consumer who has sustained less than $10,000 in damages and who must rely upon diversity or general federal question jurisdiction. And this bar exists regardless of how many consumers share a common cause of action. *Eisen* virtually ensures that the federal courts will furnish no damage remedy for the traditional consumer abuse involving large numbers of victims each with small claims.

If the typical consumer is not to be denied the protection of the law, these gaps will have to be filled. As noted above, class actions in state courts, even when authorized by state law, are not normally satisfactory remedies.[188] Government regulation of business is at best a crude and ineffective weapon against specific consumer abuses and, at worst, has perverse effects on competition and on third parties who have suffered no damage.[189] The proposed Consumer Protection Agency[190] would participate in the regulatory activities of federal agencies, and would thus have little direct impact on the type of private commercial practices which consumer class actions usually challenge.

Any successful approach to this problem will have to lower the costs of asserting consumer claims in some authoritative forum.

188. *See* notes 60 and 61, *supra*, and accompanying text.
189. *See* note 18, *supra*.
190. *See* S. 707, as reported by the Senate Government Operations Committee, 93d Cong., 2d Sess. A weaker version of the Senate bill passed the House of Representatives (H.R. 13163). On September 19, 1974, a fourth attempt by the Senate bill's sponsors to invoke cloture against a filibuster narrowly failed, and the bill is undoubtedly dead for this term of Congress.

Small claims court reform and the encouragement of various arbitration schemes present significant opportunities for enabling consumers to act expeditiously and inexpensively in their own behalf.[191]

Congressional action is another possibility. For purposes of class actions, Congress could redefine "matter in controversy" to include the aggregated claims of the members of the class. Such legislation would reverse the results of both the *Zahn* case and the earlier *Snyder* case. A bill to this effect has been introduced,[192] but passage, particularly in the face of judicial concern about overcrowded dockets, is not likely.

Overcoming the *Eisen* decision by legislation would be more complex. Manageability should remain a case-by-case determination. The notice requirement will prove to be resistant to legislative change if the Supreme Court interprets its holding in *Eisen IV* as constitutionally required and not simply as a construction of Rule 23. For the reasons stated above, due process requirements can be fully met by provision of notice well short of that mandated in *Eisen IV*.[193] If the Court shares the authors' view on this issue, it will be a relatively simple matter for Congress to amend Rule 23 to authorize the delayed notice approach or some other flexible notice mechanism.[194]

An alternative legislative solution receiving some congressional attention would establish a trust fund of sorts upon which class action plaintiffs in *Eisen*-type situations could draw, with the permission of the judge, to defray the costs of notice. In return, a percentage of the class recovery or a specific amount would be returned to the fund upon successful prosecution of the suit. This approach would be inferior to delayed notice from the efficiency point of view but would lay to rest all due process arguments.

But these and other possible legislative remedies face significant political hurdles. Even though a commission named by former President Nixon endorsed class action suits as perhaps "the most fair and effective means of adjusting consumer grievances,"[195] pow-

191. *See* S. 2928, the proposed Consumer Controversies Resolution Act, reported favorably by the Senate Committee on Commerce which would provide federal assistance to small claims courts, arbitration systems, and other consumer complaint resolution mechanisms.

192. *See, e.g.*, H.R. 16152, 93d Cong., 2d Sess. (1974).

193. *See* note 175, *supra*, and accompanying text.

194. For example, the approach taken by Judge Tyler on remand in Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971). *See* text accompanying notes 111-23, *supra*.

195. Jones, *Commission Endorses Class Actions*, Washington Post September 29, 1973, at 13, col. 4.

erful business groups regard them with anathema, as perhaps they should: no other procedural device provides large numbers of consumers with the hope of recovering money lost to unscrupulous business operators.[196]

Eisen IV inflicted a grievous injury on class actions, to be sure, but neither they nor other group remedies are dead. Class actions involving small numbers of persons either with large claims or seeking injunctive relief may still proceed relatively unencumbered in the federal courts. The use of the subclass procedure suggested by Justice Douglas in *Eisen* could resurrect that suit and others.[197] And the mandamus remedy against federal officials[198] can compel them to act lawfully, or refrain from acting unlawfully, toward the numerous citizens affected by governmental actions.

Furthermore, an increasing volume of litigation is being brought by private membership organizations on behalf of their members to enjoin consumer[199] and environmental[200] abuses, among others. This type of action sidesteps the cumbersome class action procedure entirely and, while failing to provide damages, can effectively terminate illegal action affecting large numbers of persons.

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196. *See, e.g., Taming a Legal Monster*, Wall Street Journal, June 6, 1974, at 14, col. 1.

197. *See* text accompanying notes 179-87, *supra*.

198. 28 U.S.C. § 1361.

199. *See, e.g.*, Consumers Union v. Cost of Living Council, 491 F.2d 1396 (D.C. Cir. 1974), *cert. denied*, — U.S. — (1974); Virginia Citizens Consumers Council, Inc. v. State Board of Pharmacy, 373 F. Supp. 683 (E.D. Va. 1974).

200. *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.), 412 U.S. 669 (1973).